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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 431

ARVIL R. HARNCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Petitioners,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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ARVIL R. HARDCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Petitioners,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHOADES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners, on their own behalf and on behalf of a class of others similarly situated, respectfully pray

that a Writ of Certiorari issue out of, and under the seal of this Court to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit (attached hereto and marked "Appendix A") affirming the Order of the United States District Court for the Northern District of California, Southern Division (attached hereto and marked "Appendix B").

I

OPINIONS BELOW

The opinion of the District Court is contained in its Order Granting Motion to Dismiss (Appendix B). The opinion of the Court of Appeals for the Ninth Circuit is reported at 303 F.2d 182 (attached hereto and marked "Appendix C").

II

JURISDICTION

The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of is conferred by Title 28, U.S. Code, Sec. 1254(1). The jurisdiction of the Court of Appeals was conferred by Title 28, U.S. Code, Sec. 1291, and of the District Court by Title 28, U.S. Code, Sec. 1337 and Title 29, U.S. Code, Sec. 157-9.

The Judgment of the United States Court of Appeals for the Ninth Circuit here sought to be reviewed was entered on May 16, 1962. A petition for rehearing

was filed by the petitioners on June 8, 1962, and was denied by the Court of Appeals on June 18, 1962.

III

QUESTION PRESENTED FOR REVIEW

Are the petitioners, a group of individual union members, to be denied a trial on the merits of their claim of hostile discrimination by their union and employer in the light of their complaint, the facts presented to the District Court and a decision of the California State Public Utilities Commission, of which the Court can take judicial notice?

IV

STATEMENT OF THE CASE

Petitioners and the class which they represent (hereafter referred to as "Aggrieved Employees"), are all motor coach operators, employees of respondent Western Greyhound Lines (Division of the Greyhound Corporation) (hereafter referred to as "Greyhound"). The special characteristic of the class is that all of the Aggrieved Employees have seniority dates with Greyhound between June 1, 1957, and May 28, 1959. The Aggrieved Employees, as of May 28, 1959, numbered about 250 out of approximately 3,000 motor coach operators employed by Greyhound.

Greyhound is an interstate carrier of passengers by motor coach. The total Greyhound system covers

eleven Western States but operations are divided into some eleven divisions or their equivalents, and it is into a division that operators are hired. Under normal circumstances, operators stay in one division so long as there is work available.

The employees of Greyhound are represented for collective bargaining by one of seven local unions of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America. These seven locals together make up the Council of Western Greyhound Amalgamated Divisions (hereafter referred to as "Council"). The three individual respondents are representatives of the Council.

Under collective bargaining agreements, the Aggrieved Employees, who joined Greyhound between June 1, 1957 and May 28, 1959, acquired Divisional seniority rights. (Record, Stipulation to Facts, Exhibits B and E.) The significance of Divisional seniority is that an operator holding such seniority has bidding rights and rights to jobs in that Division superior to any employees of Greyhound except those in the Division with earlier seniority dates. The fewer the men "above him" on the Divisional seniority roster, the better the choice of runs and the surer the individual is of year-round work.

On May 28, 1959, Greyhound and the Council entered into a Stipulation Agreement (Record, Complaint, Exhibit A) which affected Divisional seniority. The Agreement protected Divisional seniority for all those with seniority dates prior to June 1, 1957. It created system seniority (i.e., no secured rights in

any one division) for all those hired after June 1, 1957. Those hired into the company after May 28, 1959 had notice of the existence of system seniority on entering employment. For those with seniority dates between June 1, 1957 and May 28, 1959 (the Aggrieved Employees), however, the stipulation effected a retroactive change in their seniority rights.

The damage suffered arises from the change from Divisional to system seniority. Under the Stipulation Agreement of May 28, 1959, the Aggrieved Employees, who, prior to May 28, 1959, had security in their Division, now faced the danger of having men from other Divisions move above them on the Divisional seniority roster. With a lower position on the seniority roster, they faced a consequent poorer choice of runs, temporary furlough, or even being forced to move to another Division. This could require selling home, moving children from school, and disrupting the family. The operation of seniority systems is such that the effect on any one individual is unpredictable as individuals exercise their choice based on the changed system.

The effective date of system seniority was one part of the Stipulation Agreement which contained also provisions relating to a merger of Divisions 4, 5 and 6 of the system and other prior mergers. (Record, Complaint, Exhibit A, Sections 1(b), 2, 3.) The Stipulation Agreement was submitted to the membership of all the Amalgamated Divisions with a ballot that permitted only a yes-or-no vote on the entire Agreement. (Record, "Official Ballot", Ex-

hibit A submitted to District Court.) The explanatory letter that accompanied the ballot (Record, Exhibit B, submitted to the District Court) and on which the vote was based, stated, contrary to the facts, that there would be *no* loss of Divisional seniority.

It stated:

P. 1 (5 paragraphs from bottom):

> "The Council further stated that the identity and Division seniority rights built up over the years by members of the various divisions should and would be preserved intact."

P. 1 (2nd paragraph from bottom):

> "The first principle of the proposal is the preservation of Divisional seniority. *Every member* maintains and accumulates his seniority rights in his home Division in the same manner as at present." (Emphasis supplied.)

P. 2 (3rd full paragraph):

> ". . . Thus, the preferential seniority status of every member in his own division is preserved and he also obtains a degree of protection against furlough after he has accumulated many years of service which he may exercise to displace *new hires* in other portions of the Company." (Emphasis supplied.).

With these contradictory statements, the Stipulation Agreement was approved by the needed majority and became effective.

Although not put forward at the time of the Stipulation Agreement, in argument before the District

Court and the Court of Appeals it was alleged that June 1, 1957 was selected for the beginning of system seniority because that was the formal date of the corporate reorganization which led to the creation of Greyhound out of a number of bus systems which had before that operated under separate names.

That the corporate reorganization did not in fact affect the seniority operations is suggested by one of the aspects of the change. Prior to June 1, 1957, Pacific Greyhound lines and the Greyhound Corporation applied to the Public Utilities Commission of the State of California for approval of the proposed corporate reorganization. The Public Utilities Commission's approval was granted in Decision No. 54875, dated April 22, 1957. (A copy of a certified copy of this decision, of which this Court is asked to take judicial notice, is attached hereto as Appendix D.) The Commission's approval was based on the parties' representations that the corporate reorganization would lead to no operational changes, and would use the same personnel under the then existing rules and regulations. (Appendix D, p. xx.)

In addition to the representations made prior to June 1, 1957, in other changes in seniority arrangements, Greyhound and the Council have not established a change retroactive to June 1, 1957. For example, in the Stipulation of January 23, 1959 (Record, Stipulation to facts, Exhibit C) the first change did not become effective until March 1, 1959, *prospectively*. This Stipulation, affecting Divisions 2 and 3, was not disturbed by the Stipulation Agreement of May 28, 1959.

The gravamen of the petitioners' case, and of the claim alleged in the Complaint, is that setting June 1, 1957 as the effective date of system seniority in the Stipulation Agreement of May 28, 1959 was "hostile discrimination" directed against the Aggrieved Employees. The Complaint alleges (Record, Complaint, p. 4) that said contract "arbitrarily, unfairly and capriciously" took away the Aggrieved Employees' vested Division seniority rights. The Complaint further alleges that:

> "The Aggrieved Employees were singled out and discriminated against by being deprived of vested Divisional seniority, while all other employees' seniority rights were not affected in any way." (Paragraph IX.)

The Complaint further alleges that "By reason of the unfair, arbitrary, capricious discrimination and unreasonable contract provisions . . . the Aggrieved Employees (were) damaged . . ." (Record, Complaint, Paragraph X, p. 4.) The Complaint prays for a declaratory judgment declaring the discriminatory part of the May 28, 1959 agreement void, and for injunctive relief. Both Greyhound and the Council filed answers to the Complaint.

On April 6, 1962, the Council made a Motion to Dismiss the Complaint and was heard as a preliminary to the trial. The language of the Complaint, the circumstances surrounding the balloting on the Stipulation, and the ostensible rather than real basis for the June 1, 1957 date were urged in opposition to the Motion to Dismiss.

On May 11, 1962 the District Court granted the Council's motion to dismiss the Complaint (Appendix B), basing its decision on the distinction made in *Colbert v. Brotherhood of Railroad Trainmen,* (9th Cir., 1953) 206 F.2d 9, 13, between discrimination that is inimical to statutory or constitutional right, such as racial discrimination, and the discrimination claimed in this suit. (Appendix B, p. v.) Under Rule 12(b) of the Federal Rules of Civil Procedure, the Court's decision is taken as a summary judgment.

The Order was appealed, and the Court of Appeals held that hostile discrimination of *any* kind is prohibited, and the prohibition is not limited to discrimination on account of race. The Court affirmed the District Court's Order, however, stating that the Complaint and facts do not allege or support any improper motive or purposeful discrimination and that there is no genuine issue as to any material fact.

V

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Court below has felicitously clarified the law by deciding that hostile discrimination *of any kind* by a union is prohibited, and that discrimination is not limited to discrimination on account of race. (Appendix C, p. x.) In this, the Court followed *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S. Ct. 681, *Ferro v. Railway Express Agency, Inc.* (2d Cir., 1961) 296 F. 2d 847, *Mount v. Brotherhood*

of Locomotive Engineers (6th Cir., 1955) 226 F. 2d 604. Petitioners have no quarrel with this proposition.

The Court below erred, however, in deciding that no genuine issue of hostile discrimination is raised by petitioners' pleadings and evidence presented to the District Court. The Court below's analysis of petitioner's pleading is contrary to and in conflict with this Court's views expressed in *Conley v. Gibson* (1957) 355 U.S. 42, 78 S. Ct. 99. In this case the liberal notice pleading of the Federal Rules was reaffirmed. This Court rejected the approach to pleading as a game of skill in which one misstep by counsel could be decisive of the outcome, and accepted the principle that the purpose of pleading is to facilitate a proper decision on the merits.

The decision of the Court below is also in conflict with the Second Circuit's decision in *Ferro v. Railway Express Agency* (1961) 296 F. 2d 847, the Sixth Circuit's decision in *McHenry v. Ford Motor Co.* (1959) 269 F. 2d 18, and the Third Circuit's *Toebelman v. Missouri-Kansas Pipe Line Co.* (1942) 130 F. 2d 1016. These cases put on the party moving for a summary judgment the burden of proving that no genuine factual issues exist. They hold that all doubts are resolved *against* the party moving for a summary judgment and all favorable inferences drawn from the evidence go to the benefit of the party opposing the summary judgment. The Court's function, these cases and many others hold (see 6 Moore's *Federal Practice*, 2106 et seq.), is not to decide issues of fact but to determine whether there are issues of fact to decide.

Petitioners urge that the following two factual issues are raised by the pleading and evidence:

—did respondents act "hostilely", that is, with bad faith in discriminating against petitioners?

—is there a real basis or only an ostensible basis for the selection of June 1, 1957, as the effective date for commencing system seniority?

Under the guise of deciding that no genuine issues of fact exist, the Court below has, really, decided those two issues of fact on the scant evidence before it. The practical effect of this decision is to deny to the petitioners a trial of their claim of discrimination. It is this consequence which the Court should prevent.

Petitioners do not urge now or at any time a limitation on the freedom of a bargaining agent to negotiate an agreement which affects individual members differently. (*Ford Motor Co. v. Huffman* (1953), 345 U.S. 330, 78 S. Ct. 681.) The bargaining agent must do this, however, without hostility to any. (*Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-9, 65 S. Ct. 226, *Ford Motor Co. v. Huffman*, supra.) Ultimately, if petitioners are to prevail at a trial, they will have to prove the hostility and bad faith of the respondents. They ask only the chance to go to trial.

VI

ARGUMENT

PETITIONERS' COMPLAINT STATES A SUFFICIENT CLAIM OF HOSTILE DISCRIMINATION TO GIVE NOTICE OF ISSUE TO RESPONDENTS

The Court below failed to find in the Complaint any allegations that selecting June 1, 1957 as the date of adopting system seniority was the result of hostile discrimination against the appellants. (Appendix C, p. xiii.) They found this in spite of the allegation of Paragraph IX of the Complaint:

> "The Aggrieved Employees were singled out and discriminated against by being deprived of vested Divisional seniority, while all other employees' seniority rights were not affected in any way."
> (Record, Complaint, p. 4.)

To "single out and discriminate" implies hostility, and the lack of relevant differences as a basis for differential treatment, which was disapproved by this Court in the *Steele v. Louisville & N. R. Co.* case (supra). Webster's Third New International Dictionary (unabridged, 1961) defines the verb "discriminate":

> "To make a difference in treatment or favor on a class or categorical basis in disregard of individual merit."

With nothing more, the language of the complaint implies the hostility and bad faith required to state a claim. The common usage of the term "discrimination", as in racial discrimination, connotes the deliberate differentiation not based on rational bases which

this Court found renders a bargaining agent subject to an action in the *Steele* case and in *Ford Motor Co. v. Huffman.*

In *Ferro v. Railway Express Agency* (2d Cir. 1961) 296 F. 2d 847, the complaint stated "that defendants have in a willful and malicious manner discriminated against plaintiff in favor of members of Lodge 2147 of the Brotherhood". This language was held sufficient to entitle the plaintiff to a trial on the merits, citing *Conley v. Gibson* (1957) 355 U.S. 931, 78 S. Ct. 99, as a standard of the requirements of Federal pleading. There is no essential difference between the language of the Complaint in the instant case and in the *Ferro* case in giving respondents notice of the claim.

THE EVIDENCE BEFORE THE DISTRICT COURT, GIVING IT ALL INFERENCES FAVORING PETITIONERS, DOES NOT SUPPORT RESPONDENT'S BURDEN OF SHOWING THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST

The District Court went beyond the pleadings in considering respondents' Motion to Dismiss. It considered the Stipulation of Facts signed by all the parties, two exhibits submitted by petitioners, and a further oral stipulation. There was extensive argument by counsel for all the parties. In the course of argument, a colloquy took place between the Court and one of the attorneys for petitioners which has been labelled an "Offer of Proof" and included in the record.

As a statement of what petitioner's trial position would be, this "offer of proof" indicates on its face that it is not complete. The colloquy indicates (Record, Stipulation Re Record on Appeal, p. 3) that Mr. Darwin, one of petitioners' attorneys left it to Mr. Leff, the other of petitioners' attorneys, to complete the Statement of petitioners' trial position. In fact, the Court did not give petitioners' other counsel a chance to speak. To the extent that the "offer of proof" is a statement which binds—or "hangs"—petitioners, it is clearly not a complete statement of their position, and it is erroneous and unfair to hold the lack of any particular statement in this colloquy against the petitioners, as was done by the Court below.

The Court below decided that the record before the Court established only a difference of opinion between portions of the Union membership, and no improper motive or purposeful discrimination. (Appendix C, pp. xiv-xv.) They could decide this only by *deciding* the factual issues rather than deciding that such factual issues exist.

For example, the exhibits submitted to the District Court, the Ballot and the Communication accompanying the Ballot (Record, Exhibits A and B submitted to the District Court), indicate that the issue of the effective date of the change to system seniority was never put to the membership since the ballot had only a yes-or-no choice on accepting the entire Stipulation. Moreover, as was discussed above (pp. 5-6), the Communication as to the Ballot contained Statements that no present member (including the Aggrieved

Employees) would lose Divisional seniority. This was plainly not so. The inference may reasonably be drawn from this that the date of the change in seniority from Divisional to System was concealed, or at least an attempt was made to conceal it. This hardly shows good faith. The Court below did not even mention these exhibits in its opinion.

The Court below found a rational basis for June 1, 1957 as the date for system seniority "amply demonstrated" in the record. (Appendix C, p. xvi.) They found the corporate reorganization which established Greyhound as of June 1, 1957 as the rational basis. Petitioners submit that this was an ostensible rather than real change, in so far as its effect on employees is concerned. To find this a sufficient rational basis is again deciding the factual issue rather than recognizing the existence of an issue on which petitioners should be permitted to go to trial.

Pacific Greyhound lines and Greyhound Corporation, the predecessor organizations to Greyhound in California, have themselves represented that the corporate reorganization that led to the formation of Greyhound would lead to no changes in operations, personnel or rules and regulations. Based on these representations, the Public Utilities Commission of the State of California approved the corporate reorganization in Decision No. 51875, dated April 22, 1957. (Appendix D, p. xx.) Petitioners respectfully ask this Court to take judicial notice of the certified copy of this decision attached hereto as Appendix D.

This decision, and the representations on which it was based, when given any inference but the one most favorable to respondents, raises serious question as to the operational in contrast to corporate structural significance of June 1, 1957. It does not resolve, but it certainly raises an issue which requires a trial to settle. In other Agreements on seniority, for example, the Stipulation of January 23, 1959 (Record, Stipulations to Facts, Exhibit C), the effective change in seniority was prospective rather than retroactive, and nothing hinged on the June 1, 1957 date.

Consideration of the full evidence at a trial on the merits could well show that there was no improper motive nor purposeful discrimination by Respondents. Petitioners could have no grounds for complaint at that point. Until the evidence is presented, however, they will have been denied their day in court.

There have been many, many expressions of the need for judicial restraint in granting a Summary judgment. Petitioners urge that restraint is particularly appropriate where, as here, individual union members are challenging their union, claiming hostile discrimination. The danger of a denial of a trial on the merits should outweigh the possible danger of a trial which may ultimately prove to have been unnecessary.

Giving the petitioners the benefit of the doubt, imposing the burden on respondents of showing no genuine issues of fact, interpreting the pleading liberally and viewing the evidence with inferences favorable to the petitioners—all principles firmly estab-

lished in many cases—can lead only to the conclusion that the Court below was in error in affirming the summary judgment in respondent's favor.

VII

CONCLUSION

For the reasons given above, this petition for a Writ of Certiorari should be granted, the Judgment below should be reversed, and the case should be remanded to the District Court for trial.

Dated, San Francisco, California,
September 12, 1962.

Respectfully submitted,
DARWIN, ROSENTHAL & LEFF,
JAY A. DARWIN,
Attorneys for Petitioners.

IRWIN LEFF,
Of Counsel.

(Appendices Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 17,843

ARVIL R. HARDCASTLE, et al.,
Appellants,

vs.

WESTERN GREYHOUND LINES, et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 16, 1962.

Appendix B

In the United States District Court
Northern District of California
Southern Division

No. 40,586
No. 40,587

ARVIL R. HARDCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Plaintiffs,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Defendants.

ORDER GRANTING MOTION TO DISMISS

The factual considerations giving rise to the litigation are succinctly set forth in the complaint.

Plaintiffs, employees of Western Greyhound Lines, have initiated a class action for declaratory relief against defendant corporation and certain named individuals of the Council of Western Greyhound Amalgamated Divisions (hereinafter referred to as "Council"), in order to enjoin defendants from enforcing the provision in a collective bargaining agree-

ment entered into between Greyhound and Council which establishes a seniority date of June 1, 1957, for union members, including the individuals in the class.[1] Plaintiffs allege that the date of May 28, 1959, when the controlling agreement was consummated, is a fair and proper date for the commencement of seniority rights for all members of the Council.

Between June 1, 1957, and May 28, 1959, collective bargaining agreements were in effect between Greyhound and the Council or its then subdivisions. Under these agreements, plaintiff employees, as well as other members of the union, enjoyed divisional seniority based upon the date of employment within a particular division of Greyhound and were entitled to bid for runs within the division. Such seniority was superior to rights of other Greyhound employees in different divisions regardless of the actual date of employment.

Pursuant to the agreement which became effective May 28, 1959, Greyhound and the Council entered into a contract which protected divisional seniority enjoyed prior to June 1, 1957. For employees hired after that date, seniority would be measured on a company-wide basis. Plaintiff members of the class contend that such contract "arbitrarily, unfairly and capriciously" has taken from them seniority acquired between June 1, 1957, and May 28, 1959, during which period Greyhound assured them of a privileged position within the division.

[1] Although plaintiffs contend they represent a class in the present action, the group whose rights will be purportedly protected by plaintiffs' action is not homogeneous. Some of its members will be adversely affected by the modification sought by plaintiffs.

The particular date of June 1, 1957, represents the date upon which Pacific Greyhound Lines merged with Greyhound Corporation and became the organization which is now being sued as a defendant.

Plaintiffs attempt to bring themselves within the purview of Ferro v. Railway Express Agency, Inc., 296 F.2d 847, wherein it was alleged in part: "That defendants have, in a wilful and malicious manner discriminated against plaintiff in favor of members of Lodge 2147 of the Brotherhood." It appears from the facts therein delineated that bargaining agents sought to draw distinctions based upon power within the union favoring the politically strong against the politically weak. Although Ferro extended the doctrine of Steele v. Louisville & Nashville Ry. Co., 323 U. S. 192, and Ford Motor Company v. Huffman, 345 U. S. 330, neverthless plaintiffs cannot and do not bring themselves within the purview of the holding.

The case at bar does not charge, nor does it contemplate the type of grievance considered in Ferro.

It is significant that an employee does not have a vested nor inherent right to seniority in service. Trailmobile v. Whirls, 331 U. S. 40. The collective bargaining agreement before the court was apparently entered into after an opportunity on both sides to present and voice their differences and individual members of Council were permitted to cast their ballot accordingly, including the issue of seniority.

Whatever problem may exist with respect to altering the operative date from June 1, 1957, to May

28, 1959, is a matter of internal adjustment on the part of the union in its negotiation with Greyhound.

The case of Colbert v. Brotherhood of Railroad Trainmen, 206 F.2d 9, is dispositive of the issues. In that case at page 13, it is said:

> We think appellant failed to appreciate the essential difference between the suit laid in the complaint and cases wherein collective bargaining agreements containing invidious proscriptive factors that are inimical to statutory or constitutional right, such as racial discriminations, are presented to the court. Here no such right is involved. Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right.
>
> After extended study of the record in the light of applicable decisions of the Supreme Court of the United States, we are unable to find any error in the order granting the motions to dismiss the complaint in the District Court and such order is accordingly affirmed.

The court is without jurisdiction to entertain the complaint and the motion to dismiss is accordingly granted.

Dated, April 11, 1962.

George B. Harris
United States District Judge

Original Filed April 11, 1962;
With Clerk, U. S. District Court,
San Francisco.

Appendix C

(303 F.2d 182)

United States Court of Appeals
for the Ninth Circuit

No. 17,843
May 16, 1962

ARVIL R. HARDCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,
Appellants,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,
Appellees.

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

Before: HAMLIN, KOELSCH and DUNIWAY, Circuit Judges.

HAMLIN, Circuit Judge.

The appellants are all bus driver employees of Western Greyhound Lines which operates bus lines

throughout eleven western states. They brought an action against Western Greyhound Lines and others in the United States District Court for the Northern District of California, Southern Division, for declaratory relief and an injunction alleging that they were unlawfully deprived of certain seniority rights. Appellees moved to dismiss the appellants' complaint for failure to state a claim upon which relief could be granted. Thereafter the parties presented certain documents to the court and certain stipulations of fact were made. The appellants were asked to and did make an offer of proof before the district court. The parties have agreed that the motion before the district court should be considered as a motion for summary judgment. After consideration the motion was granted and this appeal followed. We have jurisdiction under the provisions of 28 U.S.C.A. § 1291.

The stipulation of fact entered into by the parties shows that prior to June 1, 1957, Greyhound Corporation, a Delaware Corporation, was carrying on certain common carrier activities in the northwestern part of the United States under the name Northwest Greyhound Lines, and other common carrier activities were being conducted under the name Northland Greyhound Lines. Also prior to June 1, 1957, Pacific Greyhound Lines, a California corporation, was engaged in the common carrier business in other portions of the western United States. On June 1, 1957, Pacific Greyhound Lines was merged with Greyhound Corporation and the latter corporation survived the merger. Concurrently with the merger

a division of the Greyhound Corporation was established under the name Western Greyhound Lines which division incorporated the former territories serviced by Pacific, Northwest and Northland Greyhound Lines.

Prior to the formation of Western Greyhound Lines on June 1, 1957, the employees in the territory occupied by Western Greyhound Lines were represented for collective bargaining purposes by one or another of several locals or divisions of the Amalgamated Street, Electric Railway, and Motor Coach Employees of America. Prior to and at the time Western Greyhound Lines was formed the various locals and divisions had collective bargaining agreements which provided for divisional seniority rights. Divisional seniority is a system of seniority whereby the operations of an employer are divided into divisions and whereby an employee hired into a particular division has seniority within his division over all other employees in all divisions except those employees who were hired into his particular division before him. An alternative to divisional seniority is system seniority, which means that an employee is senior only to other employees in the entire system who were hired after him. That is, any employee hired before him anywhere in the entire system would have seniority over him.

On January 10, 1958, the above mentioned locals and divisions of the Amalgamated Association formed the Council of Western Greyhound Amalgamated Divisions (referred to herein as the Coun-

cil) which was formed for the purpose of representing all the employees of Western Greyhound Lines. Various collective bargaining agreements were entered into by Western Greyhound Lines and the Council. One agreement which was dated May 28, 1959, superseded prior agreements with respect to seniority rights. It provided that only employees hired before June 1, 1957, would be entitled to retain divisional seniority rights and that all employees hired subsequently to June 1, 1957, would have only system seniority rights.

The appellant bus drivers in this case are all persons who were employed by Western Greyhound Lines between June 1, 1957, and May 28, 1959. The appellants in their complaint alleged that the adoption of system seniority on May 28, 1959, insofar as it operated retroactively to June 1, 1957, "arbitrarily, unfairly and capriciously" took away valuable divisional seniority acquired by the appellants between June 1, 1957, and May 28, 1959, the date when the contract providing for system seniority was executed. The appellants alleged that they were "discriminated against" and that the action was "unreasonable". No contention was made by appellants that the retention of seniority for employees hired before June 1, 1957, was invalid or that the adoption of system seniority for employees hired after May 28, 1959, was invalid.

We have concluded that the motion to dismiss appellants' complaint treated as a motion for summary judgment was properly granted.

In *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), a case arising under the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, the Supreme Court held that a union which purports to represent its entire membership must not engage in "hostile discrimination" against some members, but must attempt to represent all fairly, impartially and in good faith. In *Steele* certain negro railroad firemen were minority members of a union which discriminated against the negro members on the basis of race and which union entered into agreements and adopted rules whereby negroes would ultimately be excluded from the union and from working as railroad firemen. The complaint alleged facts in detail which on their face showed discrimination on account of race.[1]

Subsequent to *Steele*, hostile discrimination by a union against some of its members has been interpreted to be conduct which is proscribed by the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 *et seq.*, just as the proscription existed with respect to the Railway Labor Act. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).[2] Moreover, cases subsequent to *Steele* firmly established that hostile discrimination of any kind is prohibited and that the prohibition is not limited to discrimination on account of race. *E.g.*, *Ford Motor Co. v. Huffman supra*; *Fergo v. Railway Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961); *Mount v. Brotherhood of Locomotive Engineers*, 226 F.2d 604 (6th Cir. 1955).

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[1]See also Tunstall v. Brotherhood of Locomotive Firemen & Engineermen, 323 U.S. 210 (1944).

[2]See also Wallace Corp. v. N.L.R.B., 323 U.S. 248, 255 (1944).

Some of the general principles pertaining to collective bargaining and hostile discrimination have been stated by the Supreme Court, in *Ford Motor Co. v. Huffman, supra*, in the following manner:

> [T]he . . . purposes [of the National Labor Relations Act] are broad enough to cover terms of seniority. . . . That the authority of bargaining representatives . . . is not absolute is recognized in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-199. . . . Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any. [Citations omitted.]
>
> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[3]

[3] 345 U.S. at 337-8.

An essential element, then, necessary to raise a limitation upon a union's discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership. This element has been present in cases decided subsequent to *Ford Motor Co. v. Huffman, supra,* such as *Ferro v. Railway Express Agency, Inc., supra,*[4] *Mount v. Brotherhood of Locomotive Engineers, supra,*[5] and *Colbert v. Brotherhood*

[4]In *Ferro* a union had an agreement with Railway Express Agency providing for separate seniority districts. There were provisions for transfer of employees from one district to another. When railroad traffic decreased at one terminal due to re-routing, a dispute arose between the union and the employer as to whether men could be transferred from the terminal where work decreased to a terminal where work increased due to the re-routing. A special agreement resulted from negotiations between the union and the employer which provided for the transfer of 65 men. Those not transferred would remain on furlough. These latter persons brought an action against the union and the employer claiming that as members of one local they had been discriminated against in favor of members of another local of their union. Although the complaint broadly alleged that the defendants "have in a willful and malicious manner discriminated against plaintiff in favor of members" of another local, it appeared that plaintiffs relied on the fact that the union in signing the complained of agreement "was motivated by a desire to discriminate against them" (296 F.2d at 850). In addition the affidavit of the plaintiff filed in opposition to a motion for summary judgment stated that the "purpose" of entering into the agreement was "to discriminate against members of a politically weak local . . . in favor of a politically stronger local" (296 F.2d at 851). The court held that a cause of action had been stated within the doctrine of the *Steele* case.

[5]In *Mount* collective bargaining agreements provided for divisional seniority. Two divisions—No. 666 and No. 444—had certain geographical boundaries under which they had been operating for 48 years. No. 444 repeatedly attempted to have the boundaries changed more favorably to it. A referendum was held which sustained the position of No. 666. Within the processes provided by the Union the validity of the referendum was sustained against attacks by No. 444. When the matter was referred to a committee of the union an amendment changing the geographical

of Railway Trainmen, 206 F.2d 9 (9th Cir. 1953).[6]

The complaint in the instant case did not contain any allegation that the adoption of systemwide seniority on June 1, 1957, rather than on May 28, 1959, when the contract was executed, was the result of hostile discrimination against the appellants. The complaint nowhere alleges that the union representatives had a bad faith motive, intent or purpose in selecting June 1, 1957, rather than May 28, 1959. The complaint herein alleged that the adoption of system seniority as to the appellants was "arbitrary", "capricious" and "unreasonable." In *Colbert v. Brotherhood of Railway Trainmen, supra*, this court held that similar conclusory words ("arbitrary", "capricious" and "fraudulent") without a concomitant showing of a lack of good faith did not set forth a claim.[7] Dismissal of the complaint was affirmed. In view of the

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boundaries was proposed which would have been favorable to No. 444 notwithstanding the referendum. A complaint of No. 666 members claimed that the amendment would discriminate against them unfairly. The court sustained the complaint, saying that a cause of action would exist if the union was "engaging in hostile discrimination against a portion of the membership of the craft, *without a good faith representation of the entire membership.*" (226 F.2d at 607). [Emphasis added.] The complaint contained a complete statement of the history of the controversy.

[6]In *Colbert*, a case factually very similar to this case, the complaint of some employees alleged that a certain agreement between their union and employer providing for a change from divisional seniority to system seniority was "arbitrary, capricious and fraudulent" since it was made retroactively effective. In *Colbert* as in this case only those employees hired during the period between retroactive application of the agreement and the signing of it were adversely affected by the change. These bare allegations were held inadequate to show a cause of action under the doctrine announced in the *Steele* and *Ford Motor Co. v. Huffman* cases, *supra*.

[7]206 F.2d at 12.

fact that this case is being treated as an appeal from the granting of a motion for summary judgment, it is unnecessary for us to decide whether, in the light of *Colbert* and the later case of *Conley v. Gibson*, 355 U.S. 41 (1957), appellants' complaint failed initially to set forth a claim upon which relief could be granted.

Nowhere in the material outside the complaint which was examined by the district court do facts or allegations appear which show or tend to show any improper motive or purposeful discrimination.[8] The

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[8] At the hearing on the motion to dismiss (or summary judgment) before the district court the following proceedings took place:

"The Court: What would be your offer of proof?

"Mr. Darwin: Our offer of proof would show through witnesses that individuals, men, operators, drivers, when they signed into the divisions on the date of employment were given, at their request and at the explanation of employer representatives as well as members of their respective divisions or, as is sometimes called 'locals,' they were told that the specific division into which they were employed would be retained by them throughout their employment if they so desired. It would show by proof that some of the men undertook runs for years—and when I say years I mean two and three years in some instances—of a less desirable nature in order to work themselves up into a position of seniority within the division to make it possible for them to then obtain a more desirable run. It would show that some of the men are still so employed and but for the requirement that they select—selection is the word under this stipulation—by April 15 make a selection of other runs they would not have been prejudiced except for this stipulation.

• • • We are not addressing ourselves to the question of internal affairs and remedies within an organization, except to indicate, as we have said in our Complaint, which will be a matter of proof, that we tried within those internal regulations and rules to get relief which we have not been able to, and that is why we are here. But that is not the gravamen of our Complaint in Court, your Honor. The complaint sets up ultimate facts. We would show following those ultimate allegations by proof that within the decisions which

entire record before this court—the complaint, stipulations, offer of proof and affidavits—does nothing more than establish that there is a difference of opinion between portions of the union membership. It is admitted that the proposals for changing seniority were submitted to the union membership and passed upon favorably by a majority thereof. As stated in *Ford Motor Co. v. Huffman, supra,*

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.* The complete satisfaction of all who are represented is hardly to be expected. [Emphasis added.][9]

The appellants herein have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portions of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principle of majority rule.

The appellants in their brief on appeal state the general principle within which they seek to come in the following manner:

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have been in some instances cited by both sides, capricious, arbitrary action has been taken over what would on the surface seem to be the facade of collective agreements and bargaining."

It is evident that no facts indicating or tending to indicate any hostile discrimination or bad faith were offered. We do not imply that making such assertions in an offer of proof would in and of itself have been sufficient to warrant a denial of summary judgment.

[9] 345 U.S. at 338. See text accompanying note 3 *supra.*

> The political strength or weakness of a group is not a proper basis for discrimination as between groups of employees. That is, a modification of seniority which favors a majority group over a minority and has no other rational basis would fail to meet the test of fairness required by a union in representing its members.[16]

The stipulated facts before this court amply demonstrate that there was a "rational basis" upon which to select June 1, 1957, as the date for beginning system seniority. On June 1, 1957, the merger between Greyhound Corporation and Pacific Greyhound Lines took place. As a result Western Greyhound Lines (as a division of Greyhound Corporation) came into existence operating in the territory formerly occupied by Pacific, Northwest and Northland Greyhound Lines. June 1, 1957, was the first time when all the employees in this territory were employed by a single employer. The date for creating system seniority was the same date when the system itself was created. Moreover, after the creation of Western Greyhound Lines the employees from January 10, 1958, were represented for collective bargaining purposes by a single entity, the Council, whereas before that time the employees were represented by several locals or divisions. Thus, employees hired before the creation of the single system were not affected by the change in seniority; those hired after the system was created

[16] Appellants relied on the *Fergo* case, note 4 *supra*, as authority for the quoted proposition. However, the facts disclosed by the record in this case do not show that there was any discriminatory action in favor of one politically stronger local or faction of the union against a politically weaker local or faction. Reliance upon *Fergo* in this case is misplaced.

had seniority on a systemwide basis. It thus appears to us that the stipulated facts conclusively illustrate the presence of the "rational basis" which appellants contend is necessary.

We are not unaware of the rule that summary judgment is not to be granted unless no genuine issue as to any material fact is presented to the court.[11] However, we are of the opinion that appellants have not met the required standard. No genuine issue of material fact is presented by the record in this case. There are no allegations of bad faith or purposeful discrimination against appellants. Nor are there any facts alleged from which we can infer the possible presence of a bad faith motive in selecting June 1, 1957, as the date for starting system seniority. Furthermore, appellants offered no facts in their offer of proof from which the presence of hostile discrimination could be detected by inference or otherwise. On the other hand, undisputed facts do appear in the stipulation of facts entered into by the parties which show that in fact there was a rational basis upon which to select June 1, 1957.

Collective bargaining representatives have broad discretion to bargain with respect to seniority rights and this discretion should not be interfered with in the absence of some showing that a change in seniority rights resulted from hostile discrimination.

Judgment affirmed.

(Endorsed) Opinion Filed May 16, 1962.

Frank H. Schmid, Clerk.

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[11] See Fed. R. Civ. P. 56(c). See also Fed. R. Civ. P. 12(e).

Appendix D

Decision No. 54875
Before the Public Utilities Commission
of the State of California

Application of The Greyhound Corporation to acquire through merger the certificates of public convenience and necessity and the operating rights which are currently issued to and held by Pacific Greyhound Lines.	Application No. 38923

OPINION

This is an application for an order approving the merger of Pacific Greyhound Lines and The Greyhound Corporation.

Pacific Greyhound Lines is a California corporation having its principal place of business in San Francisco. It is engaged in the transportation of passengers, baggage and express as a common carrier by motor vehicle in interstate and intrastate commerce in Arizona, California, Nevada, New Mexico, Oregon, Texas and Utah and, in addition, is the owner of all the outstanding stock of California Parlor Car Tours Company, a California corporation engaged in operating a passenger service in this state. Its intra-California operative rights are set forth and described in

Appendix A, as amended, to Decision No. 47907, dated November 3, 1952, in Application No. 31883, by which a new certificate of public convenience and necessity was issued to the company in lieu of all presently granted authority.

The Greyhound Corporation is a Delaware corporation having its principal place of business in Chicago, Illinois, and being authorized to do business as a foreign corporation in the State of California. It presently is operating as a common carrier of passengers in 43 states, including California, and in the District of Columbia, through the medium of six operating divisions.

The Greyhound Corporation owns approximately 98% of the outstanding common stock of Pacific Greyhound Lines. Those in control of the two corporations have concluded to merge Pacific Greyhound Lines into The Greyhound Corporation under the terms of an agreement whereby the separate corporate existence of Pacific Greyhound Lines will be terminated, its capital stock canceled and all its assets, subject to its liabilities, merged into The Greyhound Corporation, the surviving corporation. Each outstanding share of the 5% cumulative preferred stock of Pacific Greyhound Lines, par value $100 a share, not presently held by The Greyhound Corporation, will be converted into one fully paid and nonassessable share of the 5% cumulative preferred stock, series of 1954, of The Greyhound Corporation, par value $100 a share. Each outstanding share of common stock of Pacific Greyhound Lines, no par value, not held by The Greyhound

Corporation will be converted into the number of fully paid and nonassessable shares of common stock of The Greyhound Corporation, par value $3 a share, which could be purchased for $50 as of the effective date of the merger, although in no event would less than three nor more than five shares of The Greyhound Corporation's common stock be issued for each share of Pacific Greyhound Lines' common stock.

The merger is part of a program which is being undertaken by The Greyhound Corporation to integrate its operations and to simplify its corporate structure. It has been approved by the Interstate Commerce Commission and the appropriate authorization has been granted by that agency with respect to the issue of stock necessary to consummate the transaction. Upon the conclusion of the transaction, the operations which will be conducted by The Greyhound Corporation in this state will be identical with the operations now conducted by Pacific Greyhound Lines. They will be carried on with the same management, personnel, equipment, facilities and other assets as are now utilized by Pacific Greyhound Lines and under the existing rates, rules, regulations and schedules. Counsel has advised the Commission that the books and records of Pacific Greyhound Lines' operations will be maintained in San Francisco and that such operations, after the merger, will be conducted and continued, as at present, by Pacific Greyhound Lines as a division of The Greyhound Corporation.

Upon the basis of the representations thus made, we are of the opinion and so find, that the proposed mer-

ger will not be adverse to the public interest. The Greyhound Corporation is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the state as the consideration for the grant of such rights. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited as to the number of rights which may be given.

The action taken herein shall not be construed to be a finding of the value of the rights and properties herein authorized to be merged.

ORDER

The Commission having considered the above-entitled matter and being of the opinion that a public hearing is not necessary and that the application should be granted, as herein provided; therefore,

It Is Hereby Ordered that:

1. The merger of the operative rights and properties of Pacific Greyhound Lines into The Greyhound Corporation for ownership, management and operation and the acquisition by The Greyhound Corporation of control of California Parlor Car Tours Company through ownership of capital stock, be, and they hereby are, approved and authorized.

2. On not less than five days' notice to the Commission and to the public, effective concurrently with the consummation of such transfer, applicants shall supplement or reissue the tariffs and timetables on file with the Commission naming rates, rules, regulations and schedules governing the operations here involved to show that Pacific Greyhound Lines has withdrawn or canceled and The Greyhound Corporation has adopted or established, as its own, said rates, rules, regulations and schedules.

3. The authority herein granted will become effective twenty days after the date hereof.

Dated at San Francisco, California, this 22nd day of April, 1957.

Peter E. Mitchell
President
Ray E. Untereiner
Matthew J. Dooley
Commissioners

(Seal)
Certified as a True Copy
Noël Coleman
Assistant Secretary
Public Utilities Commission
State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 431

ARVIL R. HARDCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Petitioners,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Respondents.

Answer of Western Greyhound Lines (Division of The Greyhound Corporation) to Petition for Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

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Respondents.

Answer of Western Greyhound Lines (Division of The Greyhound Corporation) to Petition for Certiorari

Western Greyhound Lines was formed on June 1, 1957, and, concurrently with its formation, took over the respective operations of Pacific Greyhound Lines, Northwest Greyhound Lines and Northland Greyhound Lines.

Drivers employed by the several lines had been represented by one or another of several locals ("Divisions") of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. Following the formation of Western Greyhound Lines, these locals formed a joint Council, which thenceforth acted as the bargaining representative of all drivers employed by Western Greyhound Lines.

The territory served by Western Greyhound Lines (like the respective territories served by its predecessors) is divided into operating divisions. Prior to May 28, 1959, seniority rights were acquired and exercised on a divisional basis. As highways are improved, relocated and shortened, and as other operating conditions change, it becomes desirable from time to time to alter the boundaries of operating divisions or to merge two or more operating divisions into one. Each time this had occurred, it had necessitated a rearrangement of seniority rights with resultant problems which were not always easy of solution.

In May, 1959, Western Greyhound was contemplating certain further division changes and mergers. To solve the seniority problem once and for all, it entered into an agreement with the Council under which systemwide seniority was to replace divisional seniority. Since the system had been formed on June 1, 1957, systemwide seniority rights were to accrue from that date.

The petitioners are dissatisfied with the foregoing agreement. However, like the plaintiff in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681 (1953), they have asserted no claim that their bargaining representative was actuated by any improper motive. They alleged no such motive in their complaint, nor did they assert the existence of any such motive in opposing the motion for summary judgment.

We submit that the case presents no question calling for review by this Court and that the petition for certiorari should be denied.

Respectfully submitted.

Attorneys for Respondent
Western Greyhound Lines

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OCT 18
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In the Supreme Court of the United States

OCTOBER TERM 1962

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of D. L. Rhodes, J. Adornetto and ~~Jack~~ Dan Banta in Opposition

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SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 8

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In the Supreme Court of the United States

OCTOBER TERM 1962

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C) is reported at 303 F.2d 182. The opinion of the District Court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court below (Pet. App. A) was entered on May 16, 1962. A petition for rehearing was filed on June 8, 1962, and was denied by the court below on June 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The complaint alleges that petitioners and other members of their class are employees whose seniority rights under a collective bargaining agreement have been adversely affected by an agreement, dated May 28, 1959, between their employer and their collective bargaining representative pursuant to which a system-wide seniority plan was placed into effect and made retroactive to June 1, 1957, the date that separate divisions of the employer were merged into a single system-wide operation. Before the May 28, 1959 agreement, seniority was accumulated only on a division-wide basis. The District Court, treating a motion to dismiss as a motion for summary judgment under Rule 12(b) of the Federal Rules of Civil Procedure, dismissed the complaint, and the court below affirmed. The question presented is:

Whether the complaint, exhibits and other factual materials presented to the District Court show that there is no genuine issue of fact as to the absence of improper motivation in entering into the system-wide agreement with a retroactive effective date of June 1, 1957.

STATUTES INVOLVED

The statutory provisions upon which petitioner's claim rests appear to be the following sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 8(a). It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a).

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

STATEMENT OF THE CASE

The facts upon which the District Court and Court of Appeals reached their conclusions are presented in the complaint, a stipulation of facts, exhibits, and an offer of proof made at the hearing on a motion to dismiss the complaint, which was treated as a motion for summary judgment. These facts, all of which are contained in the record before this Court, may be summarized as follows:

Prior to May 28, 1959, the collective bargaining agreements which covered employees of the predecessors of respondent Western Greyhound Lines provided for seniority upon a divisional basis, i.e., seniority rights could be asserted only within the geographical division where an employee was stationed (Compl. 3). Thus, contract rights which flowed from seniority, including the right to bid for jobs, were subject to exercise only within the particular geographical division in which an employee worked. On May 28, 1959, the bargaining representative of these employees and respondent Western Greyhound Lines entered into a new agreement establishing system-wide seniority, i.e., a program under which seniority rights could be exercised throughout the Western Greyhound Lines operations in eleven western states (Compl., par. VI). The new seniority plan was made effective as of June 1, 1957, the date upon which the various divisions, into which the eleven western states had previously been divided were merged, and Western Greyhound Lines became the single operating organization of Greyhound Corporation for that area (Stip. of Facts).

Under the agreement of May 28, 1959, employees retained their divisional seniority which had been accumulated prior to June 1, 1957, and thus their seniority status within their division remained unchanged (Exh. to Compl.). Employees hired after June 1, 1957, on the other hand, earned seniority rights under the May 28 agreement only on a system-wide basis. Thus, employees hired after June 1, 1957, but before the agreement of May 28, 1959—the class of employees on whose behalf petitioners instituted the present action—in effect had their existing divisional seniority standing converted, as of May 28, 1959, into system-wide seniority, which for the first time both subjected them to the competition of

more senior employees in other divisions within the system, and also gave them a competitive advantage *vis a vis* less senior employees throughout the system. Employees hired after May 28, 1959, of course had no divisional seniority which could be affected by the agreement, and earned only system-wide seniority. The seniority provision of May 28, 1959 was ratified by the employees affected as part of a more comprehensive agreement reached between their representative and Western Greyhound Lines (Compl. par. VIII).

The complaint alleges that the May 28 agreement "unfairly, arbitrarily and capriciously deprived each of the aggrieved employees of valuable seniority rights by placing above each of the aggrieved employees on said employee's Divisional seniority list, all of the employees of Greyhound with prior seniority dates" (Compl. par. VIII). In response to an inquiry during the hearing before the District Court as to the evidence that would be adduced in support of these allegations, petitioners' counsel made an offer of proof that employees hired between June 1, 1957 and May 28, 1959 had been "told that the specific division into which they were employed would be retained by them throughout their employment if they so desired" (Pet. App. C, p. xiv). No other factual evidence was mentioned.

The District Court, treating respondents' motion to dismiss as a motion for summary judgment, granted the motion. The Court concluded that respondents had shown by the exhibits and stipulations of fact, viewed in the light of the complaint and petitioners' offer of proof, that no genuine issue of fact existed as to the absence of malice or an invidious intent to discriminate against members of petitioners' class (Pet. App. B, p. iv). The court noted that "an employee does not have a vested nor inherent right

to seniority in service," and that the agreement of May 28, 1959 was "entered into after an opportunity on both sides to present and voice their differences and individual members . . . were permitted to cast their ballot . . . ." (*ibid.*). The court also observed that some members of the class on whose behalf the complaint was filed "will be adversely affected by the modification sought by [petitioners]" (Pet. App. B, p. ii).

The court below affirmed the District Court's judgment. Fully recognizing the legal requirement that the bargaining representative must act on behalf of all employees in the unit in good faith, and without "hostile discrimination," the court below held that "an essential element" in a case seeking to invoke this principle is a showing of "a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership" (Pet. App. C, p. xii). The court further held that "The complaint nowhere alleges that the union representatives had a bad faith motive or intent, or purpose in selecting June 1, 1957, rather than May 28, 1959" in adopting system-wide seniority, and also that "Nowhere in the material outside the complaint . . . do facts or allegations appear which show or tend to show any improper motive or purposeful discrimination" (*id.*, p. xiv). On the contrary, the opinion of the court below states that "undisputed facts do appear in the stipulation of facts entered into by the parties which show that in fact there was a rational basis upon which to select June 1, 1957" (*id.*, p. xvii). As summarized in the opinion, "The entire record before this court—the complaint, stipulations, offer of proof and affidavits—does nothing more than establish that there is a difference of opinion between portions of the union membership" (*id.*, p. xv).

ARGUMENT

1. The petition does not present a legal question relating to the obligation of a collective bargaining representative to represent employees fairly and impartially. Thus, the petition does not contest the correctness of the holding below that the conversion from a division-wide seniority arrangement to a system-wide seniority does not, of itself, constitute a breach of the trust which is vested in the bargaining representative, even though the advantages of such a change may weigh unevenly on various groups of employees. See *Trailmobile Co. v. Whirls*, 331 U.S. 40; *Ford Motor Co. v. Huffman*, 335 U.S. 330. Nor does the petition contest the validity of the legal principle, applied by the District Court and the Court of Appeals that a showing of hostility or bad faith as to a particular group of employees is an essential element in the cause of action which the complaint herein attempts to state. See *Steele v. Louisville*, 323 U.S. 192; *Ford Motor Co. v. Huffman*, *supra*. As the petition correctly states, "if petitioners are to prevail at a trial, they will have to prove the hostility and bad faith of the respondents" (Pet. 11). Accordingly, the single question presented is whether the court below could properly conclude on the basis of the factual materials before it, viewed in the light of the allegations of the complaint and petitioners' offer of proof, that there is no genuine issue of fact in this case as to the absence of any such hostility or bad faith as to the employees in the class represented by petitioners.

The foregoing question does not warrant review by this Court. In affirming the judgment of the District Court, the court below expressly recognized "the rule that summary judgment is not to be granted unless no genuine issue as to any material fact is presented to the court" (Pet. App. C, p. xvii). Thus, the determination of the question presented

involves neither a misunderstanding of the applicable procedural rule nor a question of substantive legal policy, but only the consideration of the particular pleadings and factual situation which are peculiar to this case. Decision by this Court in these circumstances would have no significance beyond this case. Accordingly, the question presented falls into the class which this Court traditionally has permitted to be finally resolved by the courts of appeals.*

2. In any event, the question presented was correctly decided below. The selection of the June 1, 1957 date as the time for the system-wide seniority plan to take effect—the single aspect of the agreement of May 28, 1959 of which petitioners complain—was keyed to the merger of the pre-existing divisions into a system-wide operation. As stated by the court below, "The date for creating system seniority was the same date when the system itself was created" (Pet. App. C, p. xvi). The reasonableness of synchronizing the adoption of system-wide seniority with the establishment of system-wide operations is self-evident, and both negates any suggestion of bad faith and shows "that in fact there was a rational basis upon which to select June 1, 1957" (Pet. App. p. xvii).

Petitioners' argument, bolstered by reference to a California Public Utilities Commission decision approving the merger of June 1, 1957, that Greyhound's organizational changes as of that date did not involve operational changes, does not offset the manifest reasonableness of utilizing the

*Petitioner's assertion (Pet. 10) that the decision below is in conflict with rulings of the Court of Appeals for the Second, Third and Sixth Circuits is entirely without merit. The decisions so relied on involved different pleadings and different facts, from which those courts concluded that factual questions were presented which warranted trial. Dissimilar pleadings and facts scarcely form a tenable basis for arguing that a motion for summary judgment should be denied in a different case.

merger date for conversion to system-wide seniority. A change in the organizational structure of an employer may be regarded as of importance in adjusting seniority rights, no less than a change in an employer's operation. In any event, the absence of a change in operations on June 1, 1957 scarcely gives rise to an issue of fact as to whether that date was selected out of hostility to a particular group of employees.

Moreover, any inference of such hostility is precluded by the circumstance that the June 1, 1957 date may well benefit employees who were hired thereafter. Such employees, by virtue of the system-wide seniority agreement, obtained the theretofore non-existent right to exercise seniority standing in other divisions as well as in their own, and it is not subject to challenge that many such employees have actually asserted this right to bid for jobs elsewhere in the Western Greyhound Lines system. It is of course also true that employees elsewhere in the system who have greater seniority are in a position to exercise rights as against the class of employees represented by petitioners. The upshot of the variegated pattern in which the new seniority provisions may manifest themselves is that some employees may be disadvantaged and others will be greatly benefited. It is impossible to predict how the system will work in any individual case, but that circumstance alone is sufficient to dispel any inference of an invidious intent to discriminate against a particular class of employees.

The foregoing undisputed facts, moreover, are to be viewed in the light of the allegations of the complaint, which do not charge petitioners with malice or bad faith. The complaint alleges only that the selection of the June 1, 1957 date was arbitrary, unfair and capricious, all of which are allegations of legal conclusions, and do not by

themselves create issues of fact. See, *Colbert v. Brotherhood of Railway Trainmen*, 206 F.2d 9 (C.A. 9), certiorari denied, 346 U.S. 931. Finally, at the hearing on respondents' motion in the District Court, petitioners were able to suggest no relevant facts that could be proven in support of their argument that respondents acted out of bad faith.

In sum, respondents presented facts in support of their motion which revealed a rational basis for selection of June 1, 1957 as the effective date for system-wide seniority, and which precluded any issue of fact as to the absence of bad faith in their decision. Petitioners, in response to this showing, presented no facts, and referred to no evidence which could reasonably be the basis for creating an issue of fact in this respect. Accordingly, the record plainly supports the summary judgment requested by respondents, and the court below correctly affirmed the District Court's ruling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

NEYHART & GRODIN
DUANE B. BEESON
Attorneys for Respondents D. L. Rhodes, J. Adornetto and Jack Banta

October, 1962.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco—ss.

Clarence Krieger, being first duly sworn, says:

That he is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 180 First Street, San Francisco, California

that affiant served a copy of the attached Brief of D. L. Rhodes, J. Adornetto and Jack Banta in Opposition on each of the following; by placing same in an envelope addressed (respectively) as follows:

Three Copies:
Jay A. Darwin
Darwin, Rosenthal & Leff
68 Post Street
San Francisco 4, California

Three Copies:
Marion B. Plant
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco 4, California

that each of said envelopes was then, on October 12, 1962 sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

Clarence Krieger

Subscribed and sworn to before me

this 12 day of October, 1962

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires July 5, 1965